

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

LONG BEACH UNIFIED SCHOOL
DISTRICT.

OAH CASE NO. 2014100978

ORDER GRANTING IN PART AND
DENYING IN PART MOTION TO
QUASH

On October 23, 2014, Student filed a Request for Due Process Hearing (complaint) with the Office of Administrative Hearings (OAH), naming Long Beach Unified School District (District) as respondent. On November 24, 2014, OAH continued the matter for good cause to March 23, 2015.

On January 29, 2015, District filed a Motion to Quash, seeking an order quashing Student's subpoena duces tecum. Student's subpoena requests District's production on February 26, 2014 (which District interprets as February 26, 2015) of the following documents: (1) all District contracts with Lindamood-Bell Processes in effect since March 1, 2013; (2) all intra-District emails and correspondence to or from District personnel during the 2013-2014 and 2014-2015 school years which mention or discuss the implementation of a language comprehension and thinking program for Student; (3) copies of all evaluation results, notes, test sheets, test work sheets, instructions and instruction manuals used for or related to Student's December 2013 assessment plan; (4) a list with the credentials, general experience, and specific experience of each evaluator who conducted any part of Student's December 2013 assessment plan; and (5) all intra-District emails and correspondence to or from District personnel during the 2014-2015 school year which mention or discuss District's denial of Parent's December 2014 and January 2015 records requests.

District contends the subpoena constitutes an impermissible attempt to obtain prehearing discovery, is facially invalid, vague and overbroad, and seeks documents which are irrelevant. District claims the subpoena seeks documents which are not education records and that it lacks a sufficient supporting declaration establishing necessity, relevance and good cause for production. District further maintains that most of the information can be obtained through the testimony of witnesses at hearing and that Student has failed to establish that the requested documents exist. District maintains Student has previously been provided with copies of all assessment results/reports and testing protocols which District agrees are education records.

On February 5, 2015, Student filed his Opposition to the Motion to Quash. Student concedes that the subpoena demands prehearing production, but he will accept production of

the documents on the first day of hearing. Student argues that District's contracts with Lindamood-Bell Processes are necessary because the testimonial evidence at hearing may be inaccurate. Student concedes that the requested emails regarding the language comprehension and thinking program are not educational records, but claims he needs such documents to show District's failure to act in good faith in its refusal to respond to Parent's request that District provide the program to Student. Student contends that the requested evaluation results, notes, test sheets, test work sheets, instructions and instruction manuals used for or related to Student's December 2013 assessment plan are educational records because they contain Student's answers, are maintained by the school psychologist who administered the assessment and that parents are entitled to inspection of such records pursuant to title 20 United States Code section 1232h(a). Student claims such records are necessary to establish that District's assessments were inappropriate and to determine District's rationale for refusing to offer the program.

APPLICABLE LAW AND DISCUSSION

In general, there is no right to prehearing discovery in due process proceedings under the Individuals with Disabilities Education Act (20 U.S.C. § 1400 et seq. (IDEA)). Rather, the IDEA provides parties with the right to present evidence and compel the attendance of witnesses at "a hearing conducted pursuant to subsection (f) or (k)" of section 1415 of title 20 of the United States Code. (20 U.S.C. § 1415(h).) California provides a similar right to present evidence and compel the attendance of witnesses in due process proceedings, but does not confer the right to prehearing discovery. (Ed. Code, § 56505, subd. (e).)

In special education proceedings in California, "[t]he hearing officer shall have the right to issue Subpoenas (order to appear and give testimony) and Subpoenas Duces Tecum (order to produce document(s) or paper(s) upon a showing of reasonable necessity by a party)." (Cal. Code of Regs., tit. 5, § 3082, subd. (c)(2).) While subpoenas duces tecum are authorized in special education hearings, their use must be consistent with the legislative and regulatory framework of these proceedings, which accord prehearing access to two types of documents: (i) parents have the right to request and receive the pupil's educational records within five business days at any time (Ed. Code, § 56504), and (ii) the parties are entitled to receive copies of all the documents the educational agency intends to use at hearing, not less than five business days prior to the hearing. (Ed. Code, § 56505, subd. (e)(7).)

Education records under the IDEA are defined by the federal Family Educational Rights and Privacy Act (FERPA) to include "records, files, documents, and other materials" containing information directly related to a student, other than directory information, which "are maintained by an educational agency or institution or by a person acting for such agency or institution." (20 U.S.C. § 1232g(a)(4)(A); Ed. Code, § 49061, subd. (b); 34 C.F.R. § 99.3.) Pupil or education records do not include "records of instructional, supervisory, and administrative personnel...which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute." (20 U.S.C. § 1232g(a)(4)(B)(i); Ed. Code, § 49061, subd. (b); 34 C.F.R. § 99.3.)

The United States Supreme Court in *Owasso Ind. School Dist. v. Falvo* (2002) 534 U.S. 426 [122 S. Ct. 934, 151 L.Ed.2d 896] (*Falvo*), after conducting an analysis of FERPA provisions related to education records, determined that not every record relating to a student satisfies the FERPA definition of “education records.” Specifically, the Supreme Court examined the FERPA provision that requires educational institutions to “maintain a record, kept with the education records of each student” (i.e., 20 U.S.C. § 1232g(b)(4)(A)), that “list[s] those who have requested access to a student’s education records and their reasons for doing so.” (*Falvo, supra*, 534 U.S. at p. 434.) The Court concluded that because this single record must be kept with the education records, “Congress contemplated that education records would be kept in one place with a single record of access.” (*Id.*) The Court further concluded that “[b]y describing a ‘school official’ and ‘his assistants’ as the personnel responsible for the custody of the records, FERPA implies that education records are institutional records kept by a single central custodian, such as a registrar...” (*Id.* at pp. 434-435.)

In *BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742, when determining whether or not an investigative report, which identified students in connection with alleged misconduct by a school district superintendent, was an education record, the Court of Appeal conducted an analysis of the “scant” judicial authority interpreting what constituted an education record. (*Id.* at pp. 751-755.) The Court of Appeal, citing *Falvo*, agreed with the Supreme Court, and stated that “the statute was directed at institutional records maintained in the normal course of business by a single, central custodian of the school. Typical of such records would be registration forms, class schedules, grade transcripts, discipline reports, and the like.” (*Id.* at pp. 751-754.) The Court of Appeal then found that the investigative report, “which was not directly related to the private educational interests of the student,” was not an education record, “as the report was not something regularly done in the normal course of business,” and “was not the type of report regularly maintained in a central location along with education records...in separate files for each student.” (*Id.* at p. 755.)

In *S.A. ex rel. L.A. v. Tulare County Office of Education* (N.D. Cal. Sept. 24, 2009) 2009 WL 3126322, *aff’d*, *S.A. v. Tulare County Office of Education* (N.D. Cal. October 6, 2009) 2009 WL 3296653, the district court found that documents such as school district emails concerning or personally identifying a student that had not been placed in his permanent file were not educational records as defined under FERPA. The court, citing *Falvo*, stated that Congress contemplated that educational records be kept in one place with a single record of access to those records. Because the emails student requested had not been placed in his permanent file, and were therefore not “maintained” by the school district, the emails were not educational records and the school district was therefore not required to produce them under a request for student records under the IDEA.

Special education law does not specifically address motions to quash subpoenas or subpoenas duces tecum. In ruling on such motions, OAH relies by analogy on the relevant portions of Code of Civil Procedure. Code of Civil Procedure section 1987.1 provides that a

court may make an order quashing a subpoena entirely, modifying it, or directing compliance with it upon such terms or conditions as the court shall declare, including protective orders.

Here, Student subpoena duces tecum provides for District's compliance by sending the requested documents to the offices of Student's attorney by February 26, 2015. With the exception of "education records," District correctly argues that special education law does not contain any provision authorizing prehearing discovery. A party does not have the power to use a subpoena to compel the production of documents before hearing. The applicable statutes and regulation securing the rights to present evidence and compel the attendance of witnesses all relate to the hearing itself. (20 U.S.C. § 1415(h); Ed. Code § 56505, subd. (e).)

Student's education records under FERPA and the Education Code can be requested from District at any time pursuant to Education Code section 56504. When a request for education records is made, the records must then be produced no later than five business days after the request is made and no showing of reasonable necessity is required. However, Student has failed to establish that all of the requested documents are education records within the meaning of FERPA and Education Code section 56504. The requested District contracts and the list of assessor credentials and experience are not education records because such information is not directly related to Student. Student also conceded that requested emails regarding the language comprehension and thinking program are not education records. Other than requested evaluation materials, Student does not argue or specifically address if and how the remaining records fall within the parameters of "education records" entitling Student to pre-hearing production, making no showing that the requested emails and correspondence are part of his permanent file.

There is no question that Education Code section 56504 requires the District to provide parents with certain evaluation materials that pertain directly to their child. (*Newport-Mesa Unified School District v. State of California Department of Education* (C.D. Cal. 2005) 371 F.Supp.2d 1170.) District agrees that the assessment results/reports and test protocols are education records, but claims that they have already been produced. However, Student has also requested instructions and instruction manuals used in connection with the assessments. Student has failed to establish that these materials are covered by Education Code section 56504. If the documents are, as Student asserts, subject to parental inspection pursuant to 20 U.S.C. § 1232h(a), then District is required to make them available so that they may be "inspected." There is no provision which permits Student to obtain "copies" of such records by subpoena as a form of prehearing discovery in an IDEA due process proceeding.

Because Student has failed to establish that all of the requested records are "education records," Student's subpoena duces tecum seeking production of such records prior to hearing is improper. Nevertheless, a subpoena duces tecum seeking production of documents on the day the hearing commences may be appropriate if the requisite showing of reasonable necessity is properly made and assuming no other legal bar to production exists. Furthermore, Student is not, as District contends, barred from subpoenaing documents at hearing merely because some of the information may be obtained through examination of the

witnesses at the hearing. Here, however, Student has failed to make the requisite showing of reasonable necessity with regard to each category of documents sought by the subpoena. The declaration attached to the subpoena falls far short of demonstrating the relevance or materiality of the requested documents to the three issues specified in the complaint, let alone of establishing that the documents are “reasonably necessary” for Student to present his case at hearing.

More specifically, the issues in this case involve District’s failure to provide an independent psycho-educational evaluation in response to Parent’s request, District’s failure to offer the language comprehension and thinking program recommended by Lindamood-Bell, and District’s failure to timely complete its assessments and hold an IEP. District’s contracts with Lindamood-Bell regarding other students have no relevance to any of these issues. Similarly, District’s internal communications regarding its refusal to produce records in response to Parent’s post-filing records requests have no bearing on whether Student is entitled to an independent educational evaluation, whether District improperly refused to provide the Lindamood-Bell program, or whether District violated the legal timelines regarding its assessments. The statement in the declaration attached to the subpoena that “Parent would like to understand what discussions, if any, took place” regarding the language comprehension and thinking program is insufficient to establish that intra-District communications regarding such program are reasonably necessary for Student to present his case at hearing.

Finally, while a list of the credentials and work experience of the assessors is arguably relevant to issues of credibility, District is under no obligation to create and produce at hearing a list which does not already exist. Student’s request that District prepare such list is an interrogatory disguised as a document request, and is therefore improper.

ORDER

1. With the exception of the assessment results/reports and test protocols regarding Student, District's motion to quash is granted.
2. District shall, within five business days of the date of this order, produce to Student's counsel all the assessment results/reports and test protocols regarding Student to the extent they have not been previously produced.
3. This order is made without prejudice to Student seeking at the prehearing conference the issuance of subpoena(s) duces tecum for production of documents at the hearing.

DATE: February 12, 2015

/s/

LAURIE GORSLINE
Administrative Law Judge
Office of Administrative Hearings